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May 4, 2010

Mr. Edward P. Lazarus
Chief of Staff
Office of Chairman Genachowski
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: *Notice of Ex Parte Communications –*

WC Docket No. 07-245 ("Pole Attachment Proceeding");
GN Docket No. 09-29 ("Rural Broadband Strategy Proceeding");
GN Docket No. 09-51 ("National Broadband Plan Proceeding"); and
WC Docket No. 09-154 ("VoIP Pole Attachment Rate Proceeding")

Dear Mr. Lazarus:

Following-up on our April 23 meeting on behalf of Allegheny Power, Baltimore Gas and Electric Co., Dayton Power and Light Co., FirstEnergy Corp., Kansas City Power and Light, National Grid, NSTAR and PPL Electric Utilities (the "*Coalition of Concerned Utilities*"), discussing the concerns of electric utility pole owners in the above-referenced proceedings, this responds to your request for additional information pertaining to the following topics:

- (1) whether electric utilities recover their marginal costs under the FCC's current Pole Attachment rates;
- (2) the average number of attachers per pole; and
- (3) the number of poles owned by electric utilities that are already "paid down."

Each of these issues is addressed below.

(1) Utilities Do NOT Recover Their Marginal Costs Under The FCC's Current Pole Attachment Rules.

The cable industry and other communications companies have misinformed the Commission about the recovery of expenses by the electric utility. Contrary to claims made by these attaching

entities, the Commission's Pole Attachment regulations do not come close to allowing utilities to recover their marginal costs incurred in accommodating communications attachments.¹

"Make-ready" payments by attachers are intended to reimburse utilities for all of their direct out-of-pocket expenses incurred to rearrange facilities on a pole or to replace ("change out") a pole for a taller pole so that the pole is ready for the new attachments. Utilities, theoretically, recover their marginal make-ready costs from attachers for these expenses.

Make-ready costs, however, are only the very beginning of a long list of costs incurred by electric utilities in accommodating communications attachments. Most of these other costs, unlike make-ready costs, are not directly recoverable by utility pole owners. Only a small fraction of these expenses is recoverable as part of the Commission's pole attachment rate formulas.

At the front of this long list of unreimbursed expenses are the considerable additional costs (\$180-\$310 per pole) required to construct pole distribution systems that are taller and more expensive than the utilities need for their own purposes. These additional capital costs are caused directly by the communications attachments, but they are not recoverable by the utilities since the rate formula does not allow for recovery of incremental capital costs.

The higher costs for taller-than-necessary poles are substantial, but they pale in comparison to the additional annual operating expenses that are caused solely by communications attachers and their attachments. Electric utilities employ teams of pole attachment personnel to manage attachments. Recordkeeping systems, work management systems, billing systems, notification systems, contract negotiations, regulatory and safety code compliance, increased insurance requirements, increased liability and the need for legal advice (not to mention participation in FCC proceedings) all add considerable costs resulting from the presence of communications attachments on utility poles. The Commission's rate formulas allow recovery of only a small fraction of these costs. Rather than recovering 100% of these types of costs caused by a cable company, for instance, the mechanics of the pole attachment formula reduce recovery to a minute percentage, far less than even the tiny 7.4% responsibility percentage for cable companies under the Commission's rules.

There is an additional, major problem. These types of costs are incurred by utilities when attachers perform in the manner in which they are *supposed* to perform under the Commission's rules. In the real world, unfortunately, attachers routinely do not perform as required by the Commission's and other applicable rules. As a result, electric utilities are routinely forced to do some of the attachers' work themselves. None of these costs is recoverable.

¹ By "marginal," we mean all of the costs the utility incurs that it would not have incurred but for the attacher. By "recover," we mean that the utility is reimbursed for these additional costs.

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Not only that, but the record in these proceedings shows that unauthorized attachments and safety violations by communications attachers are rampant. Both unauthorized attachments and safety violations create substantial liability and expense for electric utilities, yet most of these expenses also are non-recoverable.

All of these expenses are costs that electric utilities would not have incurred but for the existence of communications attachments on their poles. Yet none of these costs is directly reimbursable to the electric utility. Instead, utilities must rely on the FCC's pole attachment rate formula to recover only the small portion of these costs that the formula allows. This miniscule amount does not allow utilities to recover their marginal costs.

(2) There Are Far Fewer Attachers Than The Commission Assumes, Thereby Further Subsidizing Attachers With Artificially Low Attachment Rates.

As you know, the higher the number of presumed attachers, the lower the attachment rate under the FCC's Telecom formula. During the course of these proceedings, the *Coalition of Concerned Utilities* has provided detailed information pertaining to the number of attaching entities on poles that they own. There are, in fact, far fewer attachers on poles than the Commission's rules assume, thereby artificially driving down pole attachment rates.

If a utility does not possess information sufficient in the FCC's judgment to verify the number of attachers on its poles, the Commission requires them to assume that there are five (5) attachers in "urbanized" areas (greater than 50,000 population) and three (3) attachers in "non-urbanized areas (less than 50,000 population).

As pointed out by the *Coalition* and others, however, there are a number of problems with the Commission's presumptions. First, few electric service territories fall neatly into one category or the other, and it is often impossible from a practical perspective to determine where an "urbanized" area ends and a "non-urbanized" area begins. It is unclear to what extent the utilities' or attachers' service territories must overlap or be encircled by "urbanized" and "non-urbanized" areas to be deemed in one type of area or the other.

There are a host of other unanswered questions regarding the "urbanized/non-urbanized" distinction. For example, does it apply to the utility's entire service territory or only to the poles at issue? What if the utility serves both urbanized and non-urbanized areas, but the attacher seeks to place attachments only in an urbanized area or a non-urbanized area? To what extent should the attachers' geographic service territories be considered? None of these questions is adequately answered by existing Commission rules or precedent.

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Without the ability to distinguish between “urbanized” and “non-urbanized” areas and calculate the average numbers of attaching entities for each, many utilities by necessity have been forced to use five as the presumed number of attaching entities in their rate calculations even though five is far too high in almost every case.

The FCC’s telecom rate is dramatically reduced by the application of the Commission’s presumptions, as demonstrated by the chart below. For purposes of this comparison, the FCC’s presumptions relating to space occupied, common space and pole height were used to create the “Responsibility Percentages” under the Commission’s rules:

FCC Cable Rate	7.4%
FCC Telecom Rate (5 attachers)	11.2%
FCC Telecom Rate (3 attachers)	16.9%

Since a presumption of five attaching entities (or even three attaching entities) is not based in reality, it grossly overstates the actual number of attaching entities on utility poles and thereby artificially reduces the Telecom rate. In effect, the presumption of five (5) “phantom” attaching entities causes a further subsidization of attachers by pole owners. All of the added costs associated with these “phantom” attachers are borne completely by the utility pole owner.

The Table below demonstrates the extent to which the Commission’s presumptions regarding the number of attachers are overstated *vis-à-vis* members of the Coalition. The chart identifies the number of poles owned in whole or in part by Coalition Members that have *zero* attaching entities other than the electric utility, the number with *one* additional attaching entity, the number with *two* more, *three* more, and so on. As demonstrated, the Commission’s presumptions of three attaching entities for “non-urbanized” areas and five attaching entities for “urbanized” areas are unrealistically high.

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ATTACHING ENTITIES PER POLE

# of Poles owned in whole or in part	Total	BG&E	DP & L	KC P&L	Niagara Mohawk Power (Nat'l Grid)	Ohio Edison & Penn Power*	JCP&L*	The Illuminating Company*	Penelec	Met-Ed*	Toledo Edison Company*
Total	4,499,221	382,089	322,629	271,271	762,690	751,900	510,000	407,299	496,104	340,239	255,000
Zero Additional Attachments†	1,266,457	51,484	179,059	172,222	54,294	89,210	42,023	274,067	189,795	84,124	130,179
One Additional Attachment†	892,117	99,693	75,592	46,763	135,835	75,190	28,678	126,033	147,767	88,047	68,519
Two Additional Attachments†	1,945,832	217,845	56,460	38,110	534,345	435,000	293,470	10,379	159,337	148,370	52,516
Three Additional Attachments†	388,841	12,401	11,292	10,048	35,050	130,000	157,866	1,507	7,607	19,089	3,981
Four Additional Attachments†	30,303	610	<100	3,295	2,966	20,000	N/A	111	866	2,146	209
Five Additional Attachments†	3,326	56	<100	570	200	2,000	N/A	0	44	355	1
> Five Additional Attachments†	885	TBD	<100	263	0	500	N/A	0	9	12	1

† Other than the electric utility.

* -- Subsidiaries of FirstEnergy.

As is apparent in the Table, a sizable percentage of poles owned in whole or in part by Coalition Members have *no* additional entities attached besides the electric utility. For KCP&L and two FirstEnergy operating companies (The Illuminating Company, and Toledo Edison), more than one-half of the poles have *no* additional attachers. The number of poles that have more than three attaching entities (including the electric utility) is extremely low. Thirty percent of the poles owned by Jersey Central Power and Light (a FirstEnergy operating company) have more than three attaching entities, but for the remainder of the Coalition members, that figure is five percent or less.

There are several factors that help to explain why the number of attaching entities on poles owned by Coalition Members is far fewer than the three and five attacher presumptions used by the FCC. There is only one cable operator in most communities, and cable service does not extend to all areas reached by electric utilities. ILECs may take different routes than electric utilities or install their facilities underground. And the number of CLEC attachments is far fewer today than the Commission envisioned when its three attacher and five attacher presumptions were established.

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The following Table shows how cable attachments cover far less than the entire electric utility pole plant of Coalition Members, and shows the very small number of CLEC attachments on Coalition Member systems:

POLES WITH CABLE AND CLEC ATTACHMENTS

	Allegheny Power	BG&E	DP&L	KCP&L	National Grid	NSTAR	JCP&L*	The Illuminating Company*	Penelec*	Met-Ed*	Toledo Edison Company*	Ohio Edison & Penn Power*
# of Poles owned in whole or in part	900,000 ²	382,089	322,629	271,271	2,303,700	388,000	510,000	407,299	496,104	340,239	255,000	751,900
# of Poles owned with at least 1 cable attacher	400,000	229,809	121,000	72,821	N/A	0	182,250	1,385	203,659	203,162	112,418	526,330
# of Poles owned with at least 1 CLEC attacher	21,000	5,954	1,119	94,077	N/A	0	682	155	14,364	14,635	212	5,000

* -- FirstEnergy Operating Companies.

All utilities have system-wide records of attachments. Rather than separate pole attachment information into “urbanized” and “non-urbanized” areas, however, utilities separate their pole attachment records into other, more useful categories for a variety of reasons. For tax purposes, for instance, utilities often keep their pole attachment records separated by city, county, tax district, zip code, service territory subdivisions, and other ways, as listed below:

Allegheny -	operating company, service center
BGE -	tax district, county, city, zip code
KCP&L -	city, county, utility district
National Grid -	city, village, town
NSTAR -	city
Penelec -	municipality, township, crew area
MetEd -	municipality, township, crew area
Toledo Edison -	zip code
Illuminating Co. -	zip code, municipality

Given the ability of many utilities to determine more accurate counts of attaching entities based upon criteria other than “urbanized” and “non-urbanized,” the unworkability the existing

² Does not include jointly-owned poles.

“urbanized/non-urbanized” distinction, and the fact that the five attacher and three attacher estimates for these areas are grossly overstated, the Commission should permit utilities to develop an average number of attaching entities based upon any reasonable, well defined geographic area. Allowing such flexibility would render rate calculations more accurate and help to lessen the subsidy that already exists in the telecom rate.

**(3) The Number Of Utility Poles “Paid Down” Is Unknown
And A False Analogy In Any Event.**

Although we are unaware of any information on this subject being filed in writing in these proceedings, the argument apparently has been made orally by one or more attaching entities that since pole owners may have to some extent fully depreciated, or “paid down,” their poles, any revenue that they receive on those poles is “free money.” That’s false.

In the first place, electric utilities apply very modest annual depreciation percentages to their pole plant. Although depreciation rates are not reported every year in FERC Form 1, recent Form 1 filings by three *Coalition* members (Kansas City Power and Light, PPL Electric Utilities and Ohio Edison, an operating company of FirstEnergy) show representative depreciation rates on Account 364 (Poles) of between 2.32%-3.83% per year.

At those rates, it would take 26-45 years to fully depreciate a single pole. Considering these low depreciation rates and the regular replacement of existing poles with new poles, it is not surprising that we have never heard of an electric utility’s pole plant being anywhere near fully depreciated. And of course, under the FCC’s attachment formulas, the lower the depreciated current value of the pole plant (the “net cost of a bare pole,”), the lower the rate. There is, therefore, no “free money” being received by electric utility pole owners.

Perhaps the entities that have raised this issue are thinking about poles owned by ILECs, not electric utilities. Under the FCC’s rules, ILECs are free to establish much higher depreciation rates than those permitted for electric utilities. Some ILECs take advantage of this leniency to “super-depreciate” their plant, which can result in a fully depreciated pole plant. Some ARMIS filings show depreciation rates of 7.7%-20% per year, resulting in negative value for the ILECs’ pole plant.

If this argument holds any water at all, therefore, it is not with electric utility poles. As with other issues raised in these proceedings, the anti-competitive sins of ILEC pole owners should not be attributed to electric utility pole owners which do not offer, and have no plans to offer, communications services.

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Thanks again for the opportunity to meet last week. It was most appreciated. As discussed during our meeting, the staff's Broadband Plan is grossly biased and an unfair distortion of the record on Pole Attachments. It does not even mention -- let alone discuss or analyze -- the voluminous comments filed by *Coalition* and other representatives of the electric utility industry.

We urge the Commission not to resolve the Pole Attachment proceeding in this Quarter but to revisit these issues in a fairer, less biased environment. In particular, the record is inadequate for a decision on maintenance, operational, safety and reliability issues affecting utilities (e.g., mandatory wireless pole top attachments, "shot clock," boxing and extension arms), all areas in which the FCC has no particular expertise and should be left to the discretion of utilities and the states. Without benefit of further proceedings, the staff's blatantly one-sided staff Broadband Plan undoubtedly will unfairly influence the Commission as it considers Pole Attachments.

Please feel free to contact the undersigned if you have any questions or require any additional information.

Sincerely,



Jack Richards

Thomas B. Magee

cc: **(By electronic distribution and U.S. Mail)**

The Honorable Julius Genachowski, Chairman
The Honorable Michael J. Copps, Commissioner
The Honorable Mignon Clyburn, Commissioner
The Honorable Robert M. McDowell, Commissioner
The Honorable Meredith Attwell Baker, Commissioner

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